

1 The Court takes judicial notice of its files with respect to a prior habeas petition
2 (the "Prior Petition") Petitioner filed in this Court on or about May 7, 1991, Case No. CV
3 91-2483 JGD (JG). The Court notes that the Prior Petition was directed to the same
4 conviction and/or sentence sustained in the Los Angeles County Superior Court that is
5 challenged herein. On October 9, 1992, Judgment was entered in Case No. CV 91-2483
6 JGD (JG) denying the Prior Petition on the merits and dismissing the action with
7 prejudice.

8 The Petition now pending is governed by the provisions of the Antiterrorism and
9 Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214) ("the Act") which
10 became effective April 24, 1996. Section 106 of the Act amended 28 U.S.C. § 2244(b) to
11 read, in pertinent part, as follows:

12 "(1) A claim presented in a second or successive habeas corpus application
13 under section 2254 that was presented in a prior application shall be
14 dismissed.

15 (2) A claim presented in a second or successive habeas corpus application
16 under section 2254 that was not presented in a prior application shall be
17 dismissed unless --

18 (A) the applicant shows that the claim relies on a new rule of
19 constitutional law, made retroactive to cases on collateral
20 review by the Supreme Court, that was previously unavailable;
21 or

22 (B)(I) the factual predicate for the claim could not have been
23 discovered previously through the exercise of due diligence;
24 and

25 (ii) the facts underlying the claim, if proven and viewed in
26 light of the evidence as a whole, would be sufficient to establish
27 by clear and convincing evidence that, but for

28 ///

1 constitutional error, no reasonable factfinder would have found
 2 the applicant guilty of the underlying offense.

3 (3)(A) Before a second or successive application permitted by this section is
 4 filed in the district court, the applicant shall move in the appropriate court of
 5 appeals for an order authorizing the district court to consider the
 6 application.”

7 Therefore, because the Petition now pending challenges the same conviction as
 8 Petitioner’s prior habeas petition in Case No. CV 91-2483 JGD (JD), it constitutes a
 9 second and/or successive petition within the meaning of 28 U.S.C. § 2244(b). To the
 10 extent Petitioner seeks to pursue the same claims she previously asserted, the Petition is
 11 barred by the provisions of 28 U.S.C. § 2244(b)(1). To the extent Petitioner seeks to
 12 pursue claims not previously asserted, it was incumbent on her under § 2244(b)(3)(A) to
 13 secure an order from the Ninth Circuit authorizing the District Court to consider the
 14 Petition, prior to her filing of it in this Court. Petitioner’s failure to secure such an order
 15 from the Ninth Circuit deprives the Court of subject matter jurisdiction.

16 17 “REFERRAL” OF HABEAS CORPUS PETITION TO NINTH CIRCUIT

18 Ninth Circuit Rule 22-3(a) states, in pertinent part, that “[i]f a second or successive
 19 petition or motion, or an application for authorization to file such a petition or motion, is
 20 mistakenly submitted to the district court, the district court shall refer it to the court of
 21 appeals.”

22 Therefore, to the extent the Petition was “mistakenly submitted” to this Court, the
 23 Petition must be referred to the court of appeals. However, it is unclear whether the
 24 district court may both “refer” the Petition to the Ninth Circuit and, at the same time,
 25 dismiss the Petition. After reviewing numerous district court cases in this circuit, this
 26 Court concludes that simultaneous referral and dismissal is appropriate. *See Cielto v.*
 27 *Hedgpeth*, 2014 WL 1801110 (C.D. Cal. Apr. 23, 2014).

28 ///

DENIAL OF CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing § 2254 Actions provides:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

Here, given the Court's ruling on settled legal issues, the Court does not require any arguments from the parties on whether a certificate of appealability ("COA") should issue.

Under 28 U.S.C. § 2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Here, the Court dismissed the Petition on the ground that it was a second or successive petition. Thus, the Court's determination of whether a COA should issue is governed by the Supreme Court's decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), where the Supreme Court held that, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 529 U.S. at 484. As the Supreme Court further explained:

///

1 Section 2253 mandates that both showings be made before the court of
2 appeals may entertain the appeal. Each component of the § 2253(c) showing
3 is part of a threshold inquiry, and a court may find that it can dispose of the
4 application in a fair and prompt manner if it proceeds first to resolve the
5 issue whose answer is more apparent from the record and arguments.

6 529 U.S. at 485.

7 Here, the Court finds that its ruling is not one in which “jurists of reason would
8 find it debatable whether the district court was correct in its procedural ruling” that the
9 Court has no jurisdiction over the Petition.

10
11 ORDER

12 Pursuant to Ninth Circuit Rule 22-3(a), the Court refers the habeas Petition to the
13 U.S. Court of Appeals for the Ninth Circuit for consideration as an application for leave
14 to file a second-or-successive habeas petition. The Clerk of Court shall send a copy of
15 the habeas Petition and a copy of this Order to the Clerk of the U.S. Court of Appeals for
16 the Ninth Circuit.

17 The Clerk of Court shall provide Petitioner with a form recommended by the Ninth
18 Circuit for filing an Application for Leave to File Second or Successive Petition Under 28
19 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255.

20 This action is then dismissed without prejudice for lack of subject-matter
21 jurisdiction pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United
22 States District Courts.

23 ///

24 ///

25 ///

26 ///

27 ///

1 LET JUDGMENT BE ENTERED ACCORDINGLY.

2 A Certificate of Appealability is DENIED. This is a final order, but it will not be
3 appealable unless Petitioner obtains a certificate of appealability from the U.S. Court of
4 Appeals.²

5 As required by Fed. R. Civ. P. 58(a)(1), final judgment will be issued separately.

6
7 DATED: August 26, 2015



8
9 JOSEPHINE L. STATON
United States District Judge

10 Presented by:

11
12 /S/ FREDERICK F. MUMM
13 FREDERICK F. MUMM
14 United States Magistrate Judge

15
16
17
18
19
20
21
22
23
24
25
26
27
28

² See *Muth v. Fondren*, 676 F.3d 815, 822 (9th Cir. 2012) (citing 28 U.S.C. § 2253(c)(1)(B)), see also Fed. R. App. P. 22(b)(1).